SUPREME COURT U. S.
JAN 1968
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IN THE

Supreme Court of the United States

October Term, 1967
No. 992

LEON W. SCALES, *et al.*,

Petitioner,

vs.

ROBERT A. RIDDELL,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the case of *Robert A. Riddell v. Leon W. Scales, et al.*, 22013-18, on August 28, 1967.*

Opinion Below.

There is no reported Opinion of the District Court. A copy of the Order Denying Motion to Dismiss by the Circuit Court of Appeals is printed in Appendix "A" hereto.

*Other petitioners than those listed in the caption are as follows: Allen J. Sutherland, No. 22014; A. Paul Sutherland, No. 22015; Mona J. Mason, No. 22016; Joseph Levikow, Jr., No. 22017 and Fred J. Howarth, No. 22018.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on August 28, 1967. Rehearing was denied on September 18, 1967. The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

Question Presented.

Whether a consent or stipulated judgment is appealable.

Statute Involved.

There is no statute involved.

Statement.

A summary judgment was filed in the case of *Robert A. Riddell v. Leon W. Scales, et al.* on February 17, 1966. A Notice of Appeal from this judgment was filed by appellant, Roert A. Riddell, April 15, 1966.

On May 31, 1966, the United States District Court entered a judgment determining that the judgment entered on February 17, 1966, was not a final judgment but only a partial summary judgment.

On March 16, 1967, a stipulated or consent judgment (Appendix "B", p. 2) was prepared in the office of the United States Attorney and signed by counsel for appellant, counsel for appellees, and the United States District Court. No Notice of Appeal was filed from this judgment.

About August 3, 1967, petitioner filed a Motion to Dismiss Appeal based on three grounds: (1) There was no Notice of Appeal filed from any final judgment, (2) The only final judgment in the record was stipulated and consented to and is not appealable under any

circumstances, and (3) No extension of time was granted for filing the record on appeal and docketing the appeal beyond July 14, 1966. The Court of Appeals denied the Motion to Dismiss holding the default in filing the record "not so aggravated as to require dismissal." The Court made no mention of the issue of whether a stipulated or consent judgment is appealable. A subsequent Petition for Rehearing, filed on or about September 2, 1967, was based squarely on the consent judgment issue and was denied on September 18, 1967.

REASONS FOR GRANTING THE WRIT.

(1) The decision of the Court of Appeals for the Ninth Circuit in the instant case is directly in conflict with five decisions of the United States Supreme Court:

Pacific R. Co. v. Ketchum, 101 U.S. 289, 295, 25 L. Ed. 932, 935 (1880);

United States v. Babbitt, 104 U.S. 767, 768, 26 L. Ed. 921, 922 (1882);

Nashville, C. & St. L. Ry. Co. v. United States, 113 U.S. 261, 266, 28 L. Ed. 971, 973, 5 S. Ct. 460 (1885);

Swift & Co. v. United States, 276 U.S. 311, 324, 72 L. Ed. 587, 596, 48 S. Ct. 311 (1928);

N.L.R.B. v. Ochoa Fertilizer Corp., 368 U.S. 318, 323, 7 L. Ed. 2d 312, 313, 82 S. Ct. 344 (1961).

The decision in the instant case is additionally directly in conflict with Federal decisions in the following circuits:

C.A. 1—*Ballot v. United States,* 171 Fed. 404, 405 (1909);

C.A. 2—*Kelly's Trust v. Commissioner,* 168 F. 2d 198, 199 (1948);

C.A. 5—*White & Yarborough v. Dailey,* 228 F. 2d 836, 837 (1955);

C.A. 6—*Pergola v. Penn R. Co.,* 311 F. 2d 837, 839 (1963);

C.A. 7—*Stewart v. Lincoln-Douglas Hotel Corp.,* 208 F. 2d 379, 381 (1953);

C.A. 8—*Walling v. Miller,* 138 F. 2d 629, 631 (1943);

C.A. 9—*United States v. All American Airways, Inc.,* 180 F. 2d 592 (1950);

C.A. 10—*United States v. Star Construction Co.,* 186 F. 2d 666, 669 (1953);

Dist. of Col.—*Curry v. Curry,* 65 App. D.C. 47, 79 F. 2d 172, 174 (1935).

(2) The issue presented is clearly one of importance in the maintenance of uniformity of decisions among the eleven circuits and the Supreme Court. Were the present decision of the Court of Appeals allowed to stand, there could be no certainty of the present position regarding the appealability of stipulated or consent judgments. The Court below has so far departed from the accepted and usual course of following judicial precedent and authority that it is of sufficient importance to justify a grant of *Certiorari.*

(3) The decision of the Court of Appeals is believed to be erroneous and the opposing decisions of the Supreme Court and nine of the Circuit Courts correct. A brief statement, directly in point, from the decisions of

the Supreme Court and the Circuit Courts is more enlightening than a summary of those decisions:

Pacific R. Co. v. Ketchum, supra—"If, when the case gets here, it appears that the decree appealed from was assented to by the appellant, we cannot consider any errors that may be assigned which were in law waived by the consent, . . ." 101 U.S. at 295;

United States v. Babbitt, supra—"In *R. R. Co. v. Ketchum,* 101 U.S., 289, we decided that when a decree was rendered by consent, no errors would be considered here on appeal which were in law waived by such a consent. . . . The consent to the judgment below was in law, a waiver of the error now complained of." 104 U.S. at 768;

Nashville, C. & St. L. Ry. Co. v. United States, supra—"But the insurmountable difficulty is, that the former decree appears upon its face to have been rendered by consent of the parties, and could not therefore be reversed, even on appeal." 113 U.S. at 266;

Swift & Co. v. United States, supra—"But 'a decree which appears by the record to have been rendered by consent, is always affirmed, without considering the merits of the cause.' " 276 U.S. at 324;

N.L.R.B. v. Ochoa Fertilizer Corp., supra—"A decree rendered by consent 'is always affirmed, without considering the merits of the cause.' " 368 U.S. at 323;

Ballot v. United States, supra—"As there was no judgment of the Circuit Court in a just sense of the word [since it had affirmed a consent judgment], there was no error; . . ." 171 Fed. at 405 (C.A. 1);

Kelly's Trust v. Commissioner, supra—"The fact that the appeal was considered shows that the judgment was not by consent, for a consent judgment precludes an appeal." 168 F. 2d at 199 (C.A. 2);

White & Yarborough v. Dailey, supra—"Appeals cannot be taken from agreed judgments such as this one was, and, for that reason alone, the appeal fails." 228 F. 2d at 837 (C.A. 5);

Pergola v. Penn R. Co., supra—"No error can be asserted in the dismissal of the claim under the Federal Employers' Liability Act as this was done with the consent of plaintiff." 311 F. 2d at 839 (C.A. 6);

Stewart v. Lincoln-Douglas Hotel Corp., supra—"It is a generally accepted rule of long standing that a party who agrees or consents to the entry of an order or judgment thereby waives his right to claim that the trial court committed error in the entry of the order." 208 F. 2d at 381 (C.A. 7);

Walling v. Miller, supra—"All errors going to the merits . . . are waived by consent to the decree." 138 F. 2d at 631 (C.A. 8);

United States v. All American Airways, supra—"Such a [consent] judgment is not reversible." 180 F. 2d at 592 (C.A. 9);

United States v. Star Construction Co., supra—"A party is not aggrieved by a ruling regularly made, with his express or implied consent." 186 F. 2d at 669 (C.A. 10);

Curry v. Curry, supra—"For a consent decree, . . . is valid and binding upon all parties consenting, open neither to direct appeal nor collateral attack." 79 F. 2d at 174 (C.A. Dist. of Col.).

Counsel for petitioner, in his research of cases involving consent or stipulated judgments (including the two circuits (3d and 4th) not listed above) has been unable to find any authority holding directly or indirectly that a consent judgment is appealable.

Additionally, it does not appear possible that any exceptions to the rule mentioned in *N.L.R.B. v. Ochoa Fertilizer Corp., supra,* apply. The exceptions mentioned are lack of Federal jurisdiction, lack of actual consent, and fraud in the procurement. The Federal Courts obviously have jurisdiction of tax matters and the fact that the consent judgment (Appendix B, p. 2) was prepared in the office of the United States Attorney and contains the statement, "There exists [sic] no further issues left to be litigated and, therefore, this Stipulated Judgment . . . constitutes a final judgment of this matter," precludes a claim of fraud or lack of consent.

Conclusion.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Dated: 15th day of November, 1967.

Respectfully submitted,

ERNEST R. MORTENSON,
Counsel for Petitioner.